



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPL. NO. 113 OF 2012

BETWEEN

REPUBLICAPPLICANT

AND

RUIRU LAND DISPUTES TRIBUNAL..... 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT THIKA.....2ND RESPONDENT

DISTRICT LANDS REGISTRAR THIKA.....3RD RESPONDENT

AND

FAITH WANJIKU MUYA.....INTERESTED PARTY

EX PARTE

FELISTA WAMAITHA THUO

MILKA WANGARI MUYA

JUDGMENT

The Application

1. The *ex-parte* applicants (“the applicants”) in this matter seek the following orders in the Notice of Motion dated 12th April 2012;
1. *?* *THAT* this Honourable court do grant an order prohibiting the first and the second respondents from cancelling the applicants' title and from executing the decree issued by Thika court in 0.072 of 2007.
2. *THAT* this Honourable court do grant orders of prohibition in order to prohibit the 3rd respondents from registering the interested party as the owner of RUIRU/ MUGUTHA/BLOCK I/T 3456 and 3835.
3. *THAT* costs to be provided for.

Applicants' Case

2. The facts upon which the application is based are set out in the verifying affidavit of the 1st applicant. This matter arises out of a decision of the Ruiru Land Disputes Tribunal in **Claim No. TK/LTD/86/2006/8** dated 15th August 2007 between Faith Wanjiku Muya, the interested party, and her husband Joseph Kieha. That the said decision of the Land Dispute Tribunal was adopted by the Chief Magistrate Court at **Thika vide D O Case No. 72 of 2007** where it was ordered and decreed that the award be confirmed as the judgment of the court in the following terms; *“The Tribunal hereby requests the Hon. Court at Thika to order the District Land Registrar to register Faith Wanjiku Muya (The interested party herein) as rightful owner of plot in dispute since claimant had been claimed by Nyakinyua Investment Co vide their clearance letter ref. No. LCD/NIL/R Mugutha 840 dated 21.7.2006 for plots Nos. Ruiru/Mugutha Block 1/T.3456 and T.3835.”*
3. The 1st applicant is the duly registered proprietor of parcel number Ruiru/Mugutha Block 1/T.3825 since 12th August 2003 while the 2nd applicant is the proprietor of Ruiru/Mugutha Block 1/T.3456 since 5th January 2003. The applicants contend that the decree in **Thika Case No. D O 72 of 2007** could not be enforced against them since they were not parties to the proceedings before the Tribunal and the Court.
4. The applicants contend that since 2003, the parcels of land which are the subject matter of this application belonged to them but that the interested party made no efforts to file a case against them but against a third party.
5. The applicants also aver that they acquired the plots by virtue of being members of Nyakinyua Investment Ltd and that the interested party was neither a member of the Company nor the registered proprietor of the parcels of land subject to the proceedings.
6. The applicants urge the court to issue the orders of prohibition on the ground that the tribunal acted without jurisdiction and illegally.

Respondents' Case

7. The Attorney General, appearing for the respondents, did not file any opposition to the application but by a letter dated 27th July 2012 to the Deputy Registrar indicated that it was conceding to the application since the Tribunal dealt with the issue of ownership yet it lacked jurisdiction.

Interested Party's Case

8. The interested party opposes the application on the grounds set out in her replying affidavit sworn on 22nd August 2013. She also relies on written submissions filed on 18th November 2013.
9. The interested party depones that she was married to Joseph Muya Keiha but they are currently separated. He then married Milka Wangari Muya who is the 2nd applicant. While they cohabited, the interested party and her husband used to reside on LR No. Ruiru/Mugutha Block 1/T.3546 where she states that she built a stone house on the two parcels which are next to each other. At the time of separation there was a dispute over this property between them and suits were filed in court to determine the matters. These are **Thika DO's Case No. 72 of 2007**, **Nairobi HCCC No. 684 of 2013** and the current case.
10. The interested party contends that the decisions of the Tribunal investigated how the applicants became proprietors of the land. The applicant has shown how she purchased the two plots; LR. No. Ruiru/Mugutha/Block/T.3456 from Rachel Nyakini and Ruiru/Mugutha Block 1/T.3835 from Teresia Njeri Kiarie through the Nyakinyua Investment Company and registered them in her names. She has annexed the title deeds, letters of transfer as confirmation of ownership from Nyakinyua Investment Co., and receipts of payment for the plots. She contends that her ownership of the plots is not in dispute.

11. The interested party contends that that the Tribunal considered these matters and concluded that the interested party was the owner of the property which decision was confirmed by the Magistrates Court.
12. The interest party urges the court to dismiss the application as the Tribunal's decision was ratified by the Court.

Determination

13. This case concerns the ownership of the properties in dispute but the decision of the court must be based by reference to first principles applicable to orders of judicial review. The applicants seek orders of prohibition whose scope was outlined in ***Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996 [1997] eKLR***, "*Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....an order of prohibition.....cannot quash what has already been done...Only an order of certiorari can quash a decision already made.*"
14. With respect to the prayers sought in the motion, the applicants cannot apply for prohibition without seeking an order to quash the orders of the Tribunal and the Court. As was held by the Court of Appeal in ***Republic v University of Nairobi CA Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572***, as a matter of common-sense the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done.
15. Granting the order of prohibition without more will leave the decision of the Tribunal and Court intact. As the act sought to be prohibited has been done, the order in this case, irrespective of the circumstances, is not an efficacious remedy.
16. The applicants in this matter have also filed a civil suit being ***Nairobi HC ELC No. 684 of 2013 Milka Wangari Muya and Felistas Wamaita Thuo v Faith Wanjiku Muya*** seeking inter alia, "*An order directing the District Land Registrar Thika to cancel the title deeds for LR RUIRU/MUGUTHA BLOCK 1/T. 3835 and 3456 in the names of the Defendant and the register be rectified to show the plaintiffs as the rightful owners.*" It is apparent that applicants seek the same outcome in both cases. At least in the pending case the court will be able to adjudicate on the issue of ownership. This application is therefore an abuse of the Court process.

Disposition

17. The only possible outcome in this matter is that the Notice of Motion dated 12th April 2012 is dismissed with costs to the interested party.

DATED and DELIVERED at NAIROBI this 21st February 2014

D.S. MAJANJA

JUDGE

Ms Kariuki instructed by P. K. Njoroge and Company Advocates for the ex-parte applicants.

Mr Awino instructed by the State Law Office for the respondents.

Mr Anambo instructed by Anambo and Company Advocates for the interested party.